ATTORNEYS AT LAW

SW&M

LEGAL ISSUES BULLETIN

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COVID-19 Supplemental Paid Sick Leave

Last year, in response to the COVID-19 pandemic, Congress passed the Families First Coronavirus Response Act (FFCRA) to require employers with less than 500 employees to provide their employees with, among other things, paid sick leave for specified reasons related to COVID-19. Soon thereafter, the California state legislature bridged the gap left by the FFCRA and passed legislation to require employers with 500 or more employees to provide supplemental paid sick leave for the reasons specified under the FFCRA. The FFCRA and California state law expired on December 31, 2020.

However, some local agencies have either extended or expanded the supplemental paid sick leave laws that were adopted in 2020. As of the date of this bulletin, the following California areas provide supplemental paid sick leave in 2021: Long Beach, Los Angeles City, Los Angeles County, Oakland, Sacramento City, Sacramento County, San Francisco, San Jose, San Mateo County, Santa Rosa, and Sonoma County.

While each ordinance is different (i.e., some extended the expiration date, some expanded the scope to cover all employers, and some did both), it appears that none so far provide employees with a new "bank" of leave entitlements. In other words, if an employee already exhausted their paid sick leave under either the expired FFCRA or California state law, they do not receive a new bank of hours for 2021.

Financial institutions located in the localities listed above should review the applicable ordinance to understand their ongoing leave obligations.

Preferential Treatment to Certain Membership Groups

It is the nature of credit unions to offer special benefits to its membership groups. However, offering promotions and incentives that primarily benefit one particular group has caught the attention of the California DFPI in recent examinations and flagged as a potential violation of California Corporations Code § 7331. For reference, § 7331 provides that all memberships must have the same rights, privileges, preferences, restrictions, and conditions (except as provided in the Bylaws). For example, implementing programs that targets a specific group or allocating significant funds for promotions and incentives that are unavailable to all members could be viewed as preferential or disparate treatment (and increasing a credit union's compliance and reputational risks). Accordingly, credit unions should be cautious in structuring their marketing efforts, promotions and incentives to ensure they target and serve all members equally to avoid the perception that they are aimed at or benefit only one particular group. If California state chartered credit unions are interested in amending their Bylaws to potentially mitigate criticism in this area, contact us to discuss.

NCUA's Supervisory Priorities

On January 15, 2021, the NCUA issued its annual letter to Federally Insured Credit Unions (21-CU-02) detailing its supervisory priorities for 2021. In particular, the NCUA focuses on how the COVID-19 pandemic effects Credit Unions and their members, but touches on a number of other key areas. The letter should be reviewed for potential areas of operational improvement before the examiners arrive.

U.S. Supreme Court Renders Decision Significantly Impacting Auto Repossession Practices

On January 14, 2021, the United States Supreme Court issued its opinion in *City of Chicago v. Fulton*, holding that the mere retention of estate property after the filing of a bankruptcy petition does not violate § 362(a)(3) of the automatic stay provision of the Bankruptcy Code. In *Fulton*, the City of Chicago impounded vehicles for failure to pay fines for motor vehicle infractions. After filing Chapter 13 bankruptcy petitions, debtors would request that the City return the vehicle, only to be met with refusal. The Supreme Court affirmed that by continuing to retain possession of the vehicles after the bankruptcy filing, the City was not violating the automatic stay. In reaching its decision, the Court resolved a Circuit split which had the Ninth Circuit siding with the majority of other Circuits in holding that creditors have an affirmative duty to surrender repossessed property after the subject debtor files bankruptcy.

Post-*Fulton*, creditors who have repossessed a vehicle pre-petition do not have an affirmative duty to return the vehicle upon the filing of a bankruptcy petition, as *Fulton* recognizes that retention of the property simply maintains the pre-petition status quo. Instead, debtors will need to pursue other remedies (such as turnover under § 542 of the Bankruptcy Code) to obtain return of a vehicle. However, financial institutions must continue to monitor this area of the law, as the Court declined to address whether other subsections of the automatic stay provision could potentially be used to compel automatic return of repossessed property. Subsequent litigation that addresses these other subsections could flip the law back in the other direction again (*i.e.*, requiring automatic return of repossessed vehicles).

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Consumers with Limited English Proficiency (LEP)

On January 13, 2021, the CFPB published the "Statement Regarding the Provision of Financial Products and Services to Consumers with Limited English Proficiency" (the Statement"). While a new administration brings uncertainty, it is clear that the CFPB is focusing on ways to better serve LEP consumers. LEP consumers make up a significant portion of the U.S. population but often face challenges in learning about and accessing financial products, services, and education tools due to language barriers. The CFPB sought to provide guidance for ways to bridge the gap between LEP consumers and financial services/products, all while attempting to reduce the regulatory uncertainty with serving LEP consumers.

The Statement offers guidance in two main parts. The first part provides five general principles for financial institutions to consider regarding serving LEP consumers and the second part provides guidelines for applying those principles and implementing compliance standards to help alleviate regulatory concerns, especially with regard to UDAAP and ECOA. Although it is just a start, and the guiding principles and framework provided by the CFPB are very general, the point remains that the regulatory agencies seek to promote access to financial products and services for all consumers.

Financial institutions should review their current policies and procedures and determine how the CFPB's newly presented guidelines may impact risk and opportunity.

Military Lending Act – Class Action

In Virginia, a federal district court recently heard arguments in a class action case alleging violations of the Military Lending Act by an auto dealer (*Davidson v. United Car Sales Company, LLC*). Specifically, the plaintiffs in the case alleged, among other things, that the auto dealer's loans, which included financing for guaranteed asset protection (GAP), were covered by the MLA and should have complied with the MLA's disclosure and non-compulsory arbitration requirements. While vehicle purchase money loans are expressly exempt from the MLA and its requirements, the Department of Defense has inconsistently interpreted the exception with respect to vehicle purchase money loans that also finance GAP, most recently rescinding a prior interpretation of the rule that expressly provided that such loans were within the MLA's scope. However, because the DOD has left vague whether these loans are or are not covered by the MLA, the risk associated with such loans remains somewhat unclear. Because the auto dealer has claimed that these loans are exempt due to the vehicle purchase money loan exception, we will now see how a federal court interprets the MLA's language and the DOD's inconsistent interpretations.

Preserving the Attorney-Client Privilege

In a recent court decision out of Delaware (*Maxus Liquidating Trust v. YPF (In re Maxus Energy Corp.)*), a party's attorney-client privilege was held to be waived when a confidential memorandum was sent to a common employee within the corporate family. In short, a person worked both as an employee of YPF and as a director of its subsidiary, Maxus (a common occurrence with CUSOs and Operating Subsidiaries). Unfortunately, the parent and subsidiary ended up adverse to one another in the subsidiary's bankruptcy. The court determined that although the employee wore "two hats," the parent company failed to establish that the privileged document (*i.e.*, the Memorandum) was received by the employee solely in the employee's capacity as an employee of the parent company.

The takeaway from the *Maxus* opinion is that corporate separateness when it comes to subsidiaries is important. When people wear two hats, persons transmitting information to them should be sensitive to that. While these dual roles are normal and innocuous in good times, they can be highly problematic in dissolutions, bankruptcy, litigation, and similar situations if appropriate caution was not exercised all along.

FHFA Moratorium Extensions Now Apply Through March 31, 2021

On February 9, 2021, the Federal Housing Finance Agency (FHFA) announced Fannie Mae and Freddie Mac extensions on the moratoriums for single-family foreclosures and real estate owned evictions from February 28, 2021 through March 31, 2021. "Single-family foreclosures" applies only to single-family mortgages that are backed by Fannie Mae or Freddie Mac. "Real estate owned evictions" refers to properties that have been acquired by Fannie Mae or Freddie Mac through foreclosure or deed-in-lieu of foreclosure transactions.

The FHFA also announced that borrowers with mortgages backed by Fannie Mae or Freddie may be eligible for an additional three-month forbearance extension, provided that the borrower was on a COVID-19 forbearance plan as of February 28, 2021, subject to certain limitations. Additionally, the FHFA is allowing COVID-19 Payment Deferral for borrowers with Fannie Mae or Freddie Mac backed mortgages that cover up to fifteen (15) months of missed payments.

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